IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 865 OF 2001

Suresh Sakharam Nangare. .. Appellant.

Versus

The State of Maharashtra. .. Respondent.

None for appellant.

Mr. A.S. Gadkari, APP for State.

CORAM : J. N. PATEL AND

SMT. ROSHAN DALVI, JJ.

DATE : 4th August, 2006.

ORAL JUDGMENT : (PER J.N. PATEL, J.)

. The appellant (original accused no. 3) who was prosecuted along with Kishore Mahadeo Lokhare and Shabir Khan on a charge that on 3.3.1995 at about 8.00 p.m in room no. 11, Ganga Bhaiya Chawl, Sainath Nagar, Ghatkopar West, Mumbai where the original accused no. 1 Kishore Mahadeo Lokhare was residing, in furtherance of their common object committed murder of the younger brother of Kishore Mahadeo Lokhare by name Sanjay and thereby committed an offence punishable under Section 302 read with 34 IPC. Similarly, at the aforesaid date, time and place after committing the offence caused

disappearance of evidence with intention of screening the offenders i.e. themselves from legal punishment and thereby committed an offence under section 201 read with 34 IPC. It so happened that before the commencement of the trial, the co-accused in the case by name Shabir Khan volunteered to become approver and was granted pardon and, therefore, the original accused no. 1 Kishore Mahadeo Lokhare and the appellant (original accused no. 3) Suresh Sakaram Nangare were tried by the Additional Sessions Judge of Greater Mumbai in Sessions Case No. 816 of 1995 of the said charges and the learned trial Court found them guilty on both the counts and sentenced them to suffer imprisonment for life for having committed offence under section 302 read with section 34 IPC and further sentenced them to suffer RI for three years each and to pay a fine of Rs. 2000/- in default to suffer RI for six months for having committed offence under section 201 read with section 34 IPC. The trial Court ordered the substantive sentences on both the counts to run concurrently and confirmed the pardon granted to the approver.

2. When we took up this appeal filed by the original accused no. 3 we made specific enquiry as to whether the original accused no. 1 i.e. Kishore Mahadeo Lokhare has preferred any appeal against his conviction and sentence and we are informed by the

learned APP and so also the advocate appointed for the appellant (original accused no. 3) that the original accused no. 1 Kishore Mahadeo Lokhare has not challenged his conviction and sentence.

3. The prosecution's case can be summed up as under :-

. The original accused no. 1 Kishore Mahadeo Lokhare along with his brother Rejendra Mahadeo Lokhare (PW-1) and the deceased Sanjay were residing together in Room Mo. 11 1, Ganga Bhaiyya Chawl, Sainath Nagar Road, Ghatkopar West, Mumbai along with their families. Sanjay was not normal but suffered deformity due to typhoid and had also lost his speech. The wife of Kishore Surekha K. Lokhare used to take care of Sanjay.

4. It is the prosecution's case that the original accused no. 1 Kishore who was addicted to consumption of ganja and liquor used to ill-treat his wife and children including his own brother and his family and also the victim i.e. deceased Sanjay. Due to the said harassment all the family members except Kishore shifted to Mulund and were residing at Tata Fisson, Pipe Line, Mulund West, Mumbai. On occasions due to cruel treatment at the hands of her husband Suresh, Surekha (PW-2) used to leave the house and go to her parents place and it

was always the victim Sanjay who used to fetch her whenever she was found missing as Surekha used to take care of victim having love and affection like that of mother and son.

5. It appears that the original accused no. 1 Kishore wanted to get rid of Sanjay and so on 2.3.1995 Kishore (original accused no. 1) came to the house of his brother Rajendra (PW-1) and persuaded him to send Sanjay to his house at Ghatkopar to perform pooja as he was to go out in search of his wife. On the next day i.e. 3.3.1995 in the morning when PW-1 Rajendra visited his brother's house, he did not find Sanjay but saw his brother Suresh appellant-accused, so he returned. The very day between 10.30 p.m. to 11.00 p.m. PW-1 Rajendra got information that Sanjay has committed suicide by setting himself on fire from the appellant-accused Suresh and Shabir Khan (approver). So he went to Ghatkopar where he saw the police had already arrived. After completing the formalities, the police recorded his statement i.e. F.I.R. (Exhibit-6). The dead body of Sanjay was sent for post mortem examination and subsequently it was returned to Rajendra (PW-1) for performing last rites. In the course of investigation, police recorded statements of neighbours and after completing the investigation, filed a charge-sheet against all the three persons i.e. Suresh Sakaram

Nangare (original accused no. 3), Shabir Khan and Kishore Mahadeo LokHare (original accused no. 1). Shabir Khan is granted pardon as he turned approver. The appellant accused along with Suresh (original accused no. 3) came to be tried on the aforesaid charge that they have committed murder of Sanjay and for causing disappearance of evidence by pouring kerosene on his person and also setting him ablaze.

6. The appellant-accused so also Kishore (original accused no. 1) pleaded not guilty and claimed to be tried.

7. The trial Court on the conclusion of the trial found Kishore (original accused no. 1) and the appellant accused guilty of having committed offence under section 302, 201 read with 34 of Indian Penal Code.

8. In order to prove their case, the prosecution in all has examined 12 witnesses and also placed reliance on medical and forensic evidence as well. The only point which arises for our determination is whether the finding of the trial Court that the appellant-accused is guilty of having committed murder of Sanjay along with Kishore (original accused no. 1) and Shabir in furtherance of their common intention is correct.

9. It is submitted by Mr. Apte, the learned counsel appearing for the appellant-accused that there is no direct evidence showing the complicity of the appellant-accused and he has been convicted on the sole evidence of the approver as to his presence and participation in the crime. It is further submitted that it will not be safe to rely on the sole testimony of the approver which lacks corroboration. Further, it is submitted that even if evidence of the approver is accepted as gospel truth, still it cannot be said that the appellant-accused shared common intention with the original accused no. 1 Kishore to commit murder of his brother Sanjay. If the evidence of the approver is read in the context of the medical evidence which has come on record by examining Dr. Balkrishna Pandurang Hankare (PW-10) who conducted autopsy on the dead body, it indicates that the victim did not die due to assault but the cause of death given by Dr. Hankare is due to 100% burns which were confirmed after receipt of the C.A.'s report which stated that poison was not detected in the viscera sent for examination. Therefore, at the most it could be said that the appellant-accused shared common intention with the co-accused to the extent of assaulting Sanjay and not for committing his murder as the approver has deposed in his evidence before the Court that the appellant-accused and the approver assisted Kishore (original accused no. 1)

only in assaulting Sanjay and did not approve of Kishore (original accused no. 1) pouring kerosene on Sanjay and setting him ablaze and, therefore, the conviction and sentence deserves to be set aside.

10. The learned APP submitted that the prosecution has sufficiently established that Kishore (Original accused no. 1) wanted to get rid of Sanjay for which he took assistance of the appellant-accused and the approver and that the appellant-accused assisted Kishore (original accused no. 1) along with approver in brutally assaulting the victim till they found that he was dead. It has been clearly brought on record in the evidence of Shabir Khan (PW-7) i.e. the approver and the specific role has been assigned to the appellant-accused of having held the legs of the victim when Kishore (original accused no. 1) was assaulting and it is only Shabir Khan (PW-7) who protested when Kishore (original accused no. 1) poured kerosene on the victim and wanted to set him on fire and, therefore, the appellant-accused cannot take advantage of this fact and come up with the plea that he cannot be held guilty with the help of section 34 IPC for having committed murder of deceased Sanjay as Sanjay died due to 100% burns.

11. It is submitted that in so far as evidence of approver is concerned, it stands sufficiently

corroborated by the neighbours who actually saw Kishore (original accused no. 1) leaving the premises in a frightened condition and as their presence and participation is very much marked by the approver Shabir Khan, the appellant-accused cannot disown his liability for the crime committed in furtherance of their common intention. Therefore, there is no merit in the appeal and the same deserves to be dismissed.

12. On the point of approver's evidence Mr. Apte has drawn our attention to the decision of the Supreme court rendered in the case of Bhiva Doulu Patil vs. State of Maharashtra, reported in AIR 1963 SC 599. The learned APP submits that in so far as principles stated in Bhiva's case there cannot be any quarrel over it as there is overwhelming evidence on record to show complicity of the appellant-accused and the fact that Kishore (original accused no. 1) did not challenge his conviction sufficiently inspires confidence in the evidence of approver that it is Kishore (original accused no. 1) who along with the appellant-accused and Shabir Khan approver who were his friends and associates committed murder of Sanjay in furtherance of their common intention.

13. As regards the fact that Sanjay's death was homicidal it stands established by the prosecution

by examining Balkrishna P. Hankare (PW-10). Dr. Hankare conducted post mortem examination on the dead body of Sanjay M. Lokhare. In his deposition Dr. Hankare has deposed as under :-

> "3. It is a burn body. Averagely nourished. Riger mortis were present in muscles. No signs of decomposition and no signs of lividity noticed. Tongue was protruding outside. 4 cm. from the teeth linched cynosed tongue teeth marks on the tongue. Blood stained forth oozing through the mouth and nose. Teeth were normal. Position of the limbs - partially flexed. Surface wounds and injuries - 100% superficial to deep burn. Hair burn except few reddish black skin peeling burn.
>
> 4. In my opinion the cause of death after the post mortem was death due to 100% burns. However, viscera was kept for C.A. I received the C.A. report. After receipt of C.A. report, the final cause of death is due to 100% burn injuries. The post mortem notes are in my hand. It is signed by me. I produce the post mortem notes. It is taken on record and marked as Ex. 21. I produce the C.A. report, dated 29/9/95. The same is taken on record and marked as Ex.22."

14. During the trial, the accused persons in addition to pleading innocence also came out with the case that the deceased Sanjay committed suicide. This is also mentioned by Rajendra (PW-1) in his evidence before the Court that the appellant-accused and Shabir Khan, the approver had been to his place and told him that Sanjay has committed suicide by setting himself on fire. It is in this backdrop that Dr. Hankare was further examined by pointing out to him as to whether a person like Sanjay who was having flexed fingers would be in a position to light a match stick or lift a can containing kerosene which he has specifically negatived and confirmed that all the injuries suffered by the victim were antemortem. In his cross-examination it was specifically put to him that he has not mentioned any ligature mark if the theory of strangulation is to be accepted to which Dr. Hankare stated that he has not mentioned the ligature marks in the post mortem notes as the ligature marks were not visible.

15. On examining the medical evidence and upon considering the oral evidence of PW-1 Rajendra and PW-2 Surekha, sister-in-law of the deceased and wife of Kishore (original accused no. 1) what we find is that this was a totally false plea taken by the accused persons that Sanjay committed suicide by

pouring kerosene on his person and set himself on fire with the help of match stick. Further, we may also take note of the fact that as regards the conduct of the appellant-accused and the approver in visiting the residence of Rajendra Lokhare (PW-1) brother of original accused no. 1 and specifically informing him that Sanju, the victim, has committed suicide. This is particularly in the context that the appellant-accused has tried to wriggle out of the case from the stage which would show that he was not present when Kishore (original accused no. 1) put kerosene on the person of Sanjay and set him on fire. If this was so then there was no necessity for the appellant-accused to have accompanied the approver to the house of Rajendra Lokhare (PW-1) to give this information which has not been challenged in the evidence of Rajendra Lokhare (PW-1).

16. In so far as the conduct of Kishore (original accused no. 1) is concerned that he treated his wife and family members with cruelty, used to frequently assault the victim and wanted to get rid of him in our view Rajendra Lokhare (PW-1) AND Surekha Lokhare (PW-2) have in clear terms indicted Kishore (original accused no. 1) and, therefore on the fateful day Kishore got an opportunity to have Sanjay alone in his house. He with the help of appellant-accused and Shabir Khan, the approver, assaulted Sanjay till they were

satisfied that Sanjay is no more and it is thereafter that Kishore (original accused no. 1) poured kerosene on his person and set him ablaze which has been narrated by Shabir Khan (PW-7) the approver and at that moment of time the appellant-accused did not object though he was very much present.

17. If we go through the evidence of Shabir Khan (PW-7), he has deposed to the effect that they were together in the house of accused Kishore smoking ganja. Kishore (original accused no. 1) went inside where his brother Sanjay was present and they heard noise so they went inside and found Kishore (original accused no. 1) was sitting on the abdomen of the victim and was hitting him by fist blows on his chest and stomach. At the instance of Kishore, the appellant-accused held the legs of the victim and he was asked to hold his throat and in the transaction they realised that the victim Sanjay was motionless and thereafter Kishore got up from his abdomen told his accomplices to go out and inspite of intervention of Shabir Khan (PW-7) poured kerosene on him and set the victim on fire. Thereafter they were told to go and inform Rajendra (PW-1) that Sanjay has committed suicide. Accordingly, Rajendra was so informed by them.

18. This evidence of PW-7 Shabir Khan (PW-7)

stands well corroborated by the scene of occurrence panchanama, inquest panchanama, medical and forensic evidence which reveals the place where the victim was assaulted and set ablaze by pouring kerosene on him with their active assistance. Further, the prosecution has examined Durgavati A. Thakur (PW-4), Subhadra D. Tagad (PW-5) and Dhondiba G. Tagad (PW-6). Dhondiba Tagad has only deposed as regards harassment by Kishore caused to his family members and deceased Sanjay and that he wanted to take revenge against his brothers i.e. PW-1 Rajendra and deceased. Durgavati Thakur (PW-4) and Subhadra Tagad (PW-5) have noticed them together in the house and that at the relevant time a tape recorder was being played loudly and Durgavati also heard noise of assault and cries and noticed smoke coming out of the house of accused no. 1 and its Durgavati (PW-4) who actually entered the house and extinguished the fire by pouring water. Subhadra (PW-5) has deposed to the effect that the accused no. 1 Kishore was saying that the victim has burnt himself. In so far as the victim Sanjay visiting house of Kishore accused no. 1 is concerned, there is no doubt over the fact that the victim has come a day earlier i.e. on 2.3.1995 and one of the neighbours Chandrakant S. Wadkar (PW-3) rather helped the victim in opening the door as he was incapable of doing so. It was unfortunate that on the next day he was found murdered.

19. The prosecution has left no chance and their case rule out the theory that Sanjay's death was suicidal and have examined Dr. Pratibha V. Rege (PW-9), the Chief Occupational Therapist attached to the All India Institute of Physical Medicine and Rehabilitation and she has deposed in her evidence to the effect that the victim's left hand did not perform any function and that the right side was very poor and with such disability of the hands lighting a match stick from match box is not possible.

20. PSI Popat R. Yadav (PW-11) and PI Prakash M. George (PW-12) are the police officers concerned with the investigation in the case and, therefore, their evidence is formal in nature.

21. Therefore, on considering the evidence on record in totality, we find that the prosecution has been able to prove that Kishore (original accused no. 1) along with appellant-accused and Shabir Khan, the approver, in furtherance of their common intention, committed murder of the deceased Sanjay, a hapless victim of circumstances. The contention of the learned counsel appearing for the appellant-accused that he cannot be held guilty with the aid of section 34 of IPC cannot be accepted as the presence and participation of the

appellant-accused along with co-accused from the beginning to the end clearly indicates that the appellant-accused did share the common intention with Kishore, original accused no. 1 to commit murder of his brother Sanjay. The trial Court was, therefore, justified in holding them guilty of having committed offence under Sections 302, 201 read with 34 of IPC. Therefore, we do not find any merit in the appeal. The appeal is dismissed.

(J.N. Patel, J.)

(Smt. Roshan Dalvi, J.)